

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID SHIELDS

Claimant

VS.

KAT TRANSPORTATION

Respondent

AND

ACE-USA

Insurance Carrier

Docket No. 261,920

ORDER

Claimant appeals Administrative Law Judge Jon L. Frobish's March 8, 2001, preliminary hearing Order.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for preliminary compensation benefits. He found the parties were not subject to the Kansas Workers Compensation Act (KWCA) because claimant's injury occurred outside the state of Kansas and claimant's employment agreement specifically provided the state of Indiana's workers compensation laws shall apply to any claim for a job related injury occurring while employed by the respondent.

On appeal, claimant contends the parties are subject to the KWCA because claimant proved he suffered a repetitive injury while performing his regular truck driving job activities while working for respondent in Kansas. Moreover, claimant argues, since he was injured in Kansas, any employment contract provision that specifies another state's workers compensation law controls any claim for a job related injury is prohibited by the KWCA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board (Board) concludes the ALJ's preliminary hearing Order should be affirmed.

The Board finds claimant's testimony and the medical treatment records admitted into the preliminary hearing record prove that claimant injured his neck and low back while he was unloading a truck load of meat in Ohio on November 24, 2000. Claimant testified he had worked as a truck driver for probably 30 years. After he would unload a truck, he would usually experience some soreness but the soreness would go away. But the soreness claimant experienced after he unloaded the truck for the respondent on November 24, 2000, did not go away. Even after claimant spent the night, the next day claimant experienced increased symptoms of numbness and tingling in his left arm.

Because of those continuing symptoms, claimant obtained permission from respondent to go to the emergency room at a hospital located in Terre Haute, Indiana. The emergency room record indicates that claimant had complaints of neck pain radiating into his left arm and low back pain. A CT scan was taken of claimant's head to rule out the possibility that he had suffered a stroke. The CT scan was normal. Claimant was instructed to take Tylenol or ibuprofen for pain and an anti-inflammatory medication was also prescribed.

Claimant thereafter drove his truck to Edwardsville, Kansas where he left the load and eventually drove the truck to his home in Wichita, Kansas.

On November 28, 2000, claimant saw Jack L. St. Clair, M.D. at the Wichita Clinic, P.A. Claimant gave a history of back pain in the lower sacral and cervical areas. Also, claimant expressed numbness in his left hand. On physical examination, Dr. St. Clair found claimant with some cervical discomfort and a positive straight leg raise test. Dr. St. Clair advised claimant not to do any heavy lifting such as unloading cargo from his truck. Also, claimant was given back pain literature on exercises and instructed to follow up with a physician in one week.

On December 1, 2000, claimant was seen by another Wichita Clinic physician Scott P. Rees, M.D. Again claimant gave a history of pain in his neck and low back after unloading heavy boxes. Claimant also gave a history of experiencing numbness in his left arm the next day. But after claimant had taken the anti-inflammatory medication that was prescribed by the emergency room physician, the numbness resolved within approximately 10 hours. Claimant was diagnosed with neck and low back pain with probable radiculopathy. He was referred for an MRI examination and anti-inflammatory, pain and muscle relaxant medication was prescribed. Claimant was ordered not to drive while taking the pain and muscle relaxant narcotic medications.

Before claimant started taking the narcotic medications, he was contacted by the respondent who requested that he return the truck to the respondent's terminal in Indiana. Claimant agreed and drove the truck approximately 700 miles to respondent's terminal in Indiana. Respondent then paid for a train ticket for claimant to return to Wichita, Kansas. Claimant testified that as soon as he completed the trip he started taking the narcotic medication.

Dr. Rees saw claimant again on December 21, 2000. At that time, claimant had been in a physical therapy program with no overall significant improvement in his pain. Claimant still had complaints of pain in his neck and low back. The MRI examination showed degenerative changes in claimant's cervical spine. Dr. Rees then referred claimant to a neurosurgeon for further evaluation and treatment recommendations. Respondent and its insurance carrier would not authorize the referral to the neurosurgeon and denied claimant's Kansas workers compensation claim.

Respondent argues that the KWCA does not apply because claimant's alleged injuries occurred outside the state of Kansas and the contract of employment was not made in Kansas. The Board agrees with the respondent that claimant's neck and low back injuries occurred as a result of claimant unloading his truck in Ohio on November 24, 2000. At this point in the proceedings, the Board concludes, as did the ALJ, that claimant failed to prove after he unloaded the truck in Ohio on November 24, 2000, that he suffered further injury to his neck and low back while he was driving his truck in Kansas. In fact, the medical records show that after claimant was examined in Terre Haute, Indiana, and took the prescribed anti-inflammatory medication his numbness in his left arm resolved.

But the Board agrees with claimant that the contract of employment between respondent and claimant was made in Kansas when claimant accepted respondent's job offer during a telephone conversation between claimant and a representative of respondent at claimant's home in Wichita, Kansas. Any other formalities required of the employment contract were conditions subsequent to the contract and did not prevent it from initially coming into existence.¹ Thus, although claimant's injury was sustained outside of Kansas, the KWCA applies because the employment contract was made in Kansas, "unless the contract specifically otherwise provides."²

Claimant voluntarily completed agreements with respondent that specifically set out that the Indiana workers compensation laws would apply to the settlement of any claims arising out of any job related death, injury or illness of the employee.³ The Court of

¹Shehane v. Station Casino, 27 Kan. App.2d 257,263, 3P.3d 551 (2000)

²See K.S.A. 44-506.

³February 22, 2001, Preliminary Hearing Transcript, exhibit 2.

Appeals has held the KWCA applies even where the injured worker's employment contract contained a generic choice of law provision instead of a provision that specifically provided that another states' workers compensation law would apply to any workers compensation claims.⁴ In that case, the worker was injured in Missouri but the employment contract had been made in Kansas. But in this case claimant voluntarily entered into agreements with respondent that specifically set out that any workers compensation claims would be controlled by the Indiana workers compensation laws. The Board concludes, as did the ALJ, that the parties are not subject to the KWCA.

WHEREFORE, it is the finding, decision and order of the Board that ALJ Jon L. Frobish's March 8, 2001, preliminary hearing Order, that denied claimant's request for preliminary benefits because the parties are not subject to the KWCA, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

⁴Shehane, 27 Kan. App. 2d at 263.